NOTES

Monetizing Infringement: A New Legal Regime for Hosts of User-Generated Content

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INTRODUCTION

Over the last twenty years, the Internet has blossomed from its earlier role as a method of connecting military experts and scientists to one of the most widely used staples of everyday life. In 2010, Americans spent an average of thirty-two hours per month on the Internet. This is in large part due to the freedom that the Internet provides to users around the world, not just to express themselves socially through Facebook and Google Chat, but also to protest oppressive regimes and coordinate social and political movements. However, this

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4. Several significant political and social reforms have occurred around the world over the past few years, facilitated in large part by the Internet. One of the most recent outrages has occurred as a result of a viral video detailing the atrocities in Uganda committed by rebel leader Joseph Kony. See Rodney
freedom does not come without consequences. The users’ ability to do as they please, with relative anonymity and ease, has allowed for wide-scale copyright infringement.\(^5\) Thus, industries that profit from copyrights have been facing an uphill battle in trying to prevent their works from being used without permission.\(^6\)

Not long after the Internet became commercialized, the first copyright suits were brought against those providing internet services,\(^7\) and as the Internet has advanced, problems related to the Internet and copyright infringement have only become more significant and widespread. In 1999, Napster became one of the first internet services to provide users with the ability to freely share copyrighted materials.\(^8\) This immediately sparked concerns among copyright owners, and within two years a court-ordered injunction led to the service’s demise.\(^9\)

But by that point, numerous peer-to-peer file-sharing services had popped up in its place.\(^10\)

A new wave of copyright concerns arose with the rise of “Web 2.0.” Though Web 2.0 may not have one particular definition, its central focus is on collaboration and sharing user-generated content.\(^11\) Whereas peer-to-peer file-sharing services predominantly involved copyrighted works,\(^12\) hosts of user-generated content, such as YouTube, provide significantly more than just copyrighted

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6. This Note focuses specifically on audio/video content creators, but others, such as writers, have similarly had to deal with copyright violations.


12. See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 933–34 (2005). However, some file-sharing services, such as BitTorrent, do have significant noninfringing uses. See Ed Felten, BitTorrent: The Next Main Event, Freedom to Tinker (June 28, 2005), https://freedom-to-tinker.com/blog/felten/bittorrent-next-main-event/.
content. The dual nature of these websites causes problems for both copyright owners and the internet hosts of user-generated content. Copyright owners want to protect their rights from being infringed upon, whereas hosts of user-generated content want to allow their users to upload and share any works that they have legally created. Fair use laws make it even more difficult to determine when an infringement has occurred because they allow a user to legally incorporate parts of a copyrighted work without the copyright holder’s permission.

The conflict of interest between content hosts and copyright owners has been on the rise, and in April 2012 it boiled over when the Second Circuit came down with its decision in Viacom v. YouTube. The Second Circuit reversed the district court’s grant of summary judgment in favor of YouTube, finding that there was a genuine issue of material fact as to whether YouTube had actual knowledge of copyright infringement on its site or was merely willfully blind to the infringement. This decision could have an enormous impact on companies that host user-generated content, making it unclear whether a host is now protected by the safe-harbor provisions of the Digital Millennium Copyright Act (DMCA). But the decision also creates the opportunity to change the legal regime governing copyright issues for hosts of user-generated content.

This Note argues for a new, opt-in legal regime that would provide clear legal safeguards for hosts of user-generated content, while simultaneously providing financial incentives for copyright-content creators. This new regime would be based partially on the principles behind ex ante regulation and self-regulation, rather than the ex post enforcement that typically governs in United States copyright law. It would provide hosts of user-generated content with the option to pay a fee in exchange for the right to host certain copyrighted works uploaded by users, eliminating the fear of a lawsuit for contributory infringement or vicarious liability. The opt-in nature of the regime would protect the current safeguards for content hosts contained within the DMCA while allowing those who choose to abide by the new regime to gain additional legal protections.

Part I of this Note explains the current crisis that hosts of user-generated content and content creators face, particularly in light of the Second Circuit’s Viacom v. YouTube decision. Part II discusses three types of legal regimes for

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13. See Steven Hetcher, User-Generated Content and the Future of Copyright: Part One-Investiture of Ownership, 10 VAND. J. ENT. & TECH. L. 863, 868 (2008) (explaining that websites such as MySpace and YouTube offer “a genuinely large variety of content, much of which is original, at least in significant part”).
16. Id. at 41–42.
enforcing property rights: ex ante regulation, ex post enforcement, and self-regulation. It considers the pros and cons of each regime, and addresses specific examples related to the Internet to demonstrate how each regime works and where potential failure points lie. Part III suggests an alternative, opt-in legal framework that would economically and legally benefit both hosts of user-generated content and content creators. It also addresses some of the limitations and concerns of the proposed plan.

I. CURRENT STATE OF COPYRIGHT LAW FOR HOSTS OF USER-GENERATED CONTENT

Copyright law provides for two different types of liability: direct and indirect. Under a direct liability theory, any person who reproduces, distributes, publicly performs, publicly displays, or prepares a derivative work of copyrighted material is liable to the copyright holder for infringement. For hosts of user-generated content, however, indirect liability is the greater concern. There are two different theories of indirect liability: vicarious liability and contributory infringement. A website infringes vicariously when “profiting from direct infringement while declining to exercise a right to stop or limit it.” Contributory infringement occurs when a website “intentionally induc[e] or encourage[s] direct infringement.” The nature of the Internet and the general inclusiveness of these liability theories led to a wave of litigation against websites, prompting Congress to adopt protections for hosts by passing the DMCA in 1998.

20. See, e.g., Alcatel USA, Inc. v. DGI Techs., 166 F.3d 772, 779 (5th Cir. 1999).
21. 17 U.S.C. § 106 (2006). However, the infringing party may avoid liability by raising certain defenses, such as fair use. Id. § 107.
22. For a discussion on the relevance of direct infringement for internet companies, see Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1159–63 (9th Cir. 2007); Russell J. Frackman & Jeffrey D. Goldman, Back to the Future: The Napster Decision Confirms the Applicability of Traditional Copyright Principles to the Internet, 2 Sedona Conf. J. 31, 32–34 (2001).
23. Both of these theories are derived from common law. See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005). It is unclear whether a third theory of indirect liability, inducement, is a separate theory or whether it is contained with one of the two existing theories. Compare Viacom Int’l, Inc. v. YouTube, Inc., 676 F.3d 19, 28 n.5 (2d Cir. 2012) (citing Grokster, 545 U.S. at 930–31, 936–37) (stating that “[d]octrines of secondary copyright infringement include contributory, vicarious, and inducement liability”), with Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 726 (9th Cir. 2007) (quoting Grokster, 545 U.S. at 930) (defining contributory liability as “intentionally inducing or encouraging direct infringement”) amended by 508 F.3d 1146 (9th Cir. 2007). Although inducement theory may be important to hosts of user-generated content, its status as a separate theory of liability is beyond the scope of this Note.
24. Grokster, 545 U.S. at 930 (citing Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963)).
25. Id. (citing Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)).
The DMCA provided immunity to certain internet services by creating “safe harbors” for services that comply with specific rules. For hosts of user-generated content, the most relevant safe-harbor is § 512(c), which protects against infringement claims for websites that host information “at the direction of a user.” However, for immunity to apply, the website must comply with three requirements: (1) it must not have actual knowledge that the material is infringing, (2) it must not be aware of circumstances from which infringing activity is apparent (“red flag” knowledge), and (3) it must quickly take down infringing content upon obtaining knowledge of the infringement. Furthermore, the website must not receive financial benefit directly attributable to the infringement when the website has the “right and ability to control such activity.” A host of user-generated content that complies with these requirements will not be liable for monetary damages as a result of copyright infringement.

Prior to the Second Circuit’s decision in Viacom v. YouTube, these conditions were construed narrowly and there was a significant burden on the plaintiff to show actual or “red flag” knowledge. In the district court decision in Viacom, Judge Stanton held that these provisions required “knowledge of specific and identifiable infringements of particular individualized items. Mere knowledge of prevalence of such activity in general [was] not enough.” Though YouTube may have had general knowledge that it hosted infringing content, it did not have knowledge of specific infringing content, and therefore it was protected by the safe-harbor provision. Furthermore, Judge Stanton held that, in regards to the requirement that a host control infringement, YouTube would have had to have been aware of the specific infringement before it would have had the requirement to control it. In UMG v. Shelter, the Ninth Circuit similarly found that mere general knowledge that a service could be used for copyright infringement was insufficient to create actual knowledge on the part of the service provider. The court refused to impose investigative duties on the host’s websites, noting that the “burden of determining whether [materials] are actually illegal on a service provider” remains on the plaintiff.

27. See 17 U.S.C. § 512 (2006). For safe harbors to apply, the website must be considered a “service provider,” and hosts of user-generated content are typically considered service providers. See, e.g., UMG Recordings, Inc. v. Shelter Capital Partners, L.L.C., 667 F.3d 1022, 1031 (9th Cir. 2011); see also Gallo, supra note 26, at 293.
29. Id. § 512(c)(1)(A).
30. Id. § 512(c)(1)(B).
31. See id. § 512(c).
33. Id. at 518–19, 529.
34. Id. at 525.
35. 667 F.3d 1022, 1038 (9th Cir. 2011).
36. Id. (quoting Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1114 (9th Cir. 2007)).
However, the Second Circuit’s decision in *Viacom* has added uncertainty to the meaning of the safe-harbor provision. The Second Circuit vacated the district court’s decision granting summary judgment, remanding it back for further proceedings. The Second Circuit affirmed the district court’s holding that actual or “red flag” knowledge required knowledge of “specific and identifiable instances of infringement.” But in two portions of its decision, the Second Circuit disagreed with Judge Stanton. First, the court adopted a “willful blindness” test for service providers. This doctrine does not require hosts to actively seek out copyrighted materials on its system, but it does vitiate the safe-harbor immunity for hosts that are “aware of a high probability of the [infringement] and consciously avoid[] confirming that fact.” The court remanded the case to determine if YouTube had been willfully blind, but this leaves unclear what a host of user-generated content would need to know in order to “consciously avoid” confirming the infringement.

The second ambiguity that the Second Circuit created regards the control and benefit requirement placed on hosts. The Second Circuit held that a host need not have item-specific knowledge of infringement to be required to control the infringement. The right and ability to control instead “requires something more than the ability to remove or block access to materials posted on a service provider’s website.” This is in stark contrast to the Ninth Circuit, which has held that the right and ability to control may not be exercised until the host becomes aware of the specific infringement. The Second Circuit refused to explain “something more,” though it provided examples, such as inducement or using a monitoring program to prevent users from undertaking certain actions. This holding creates significant uncertainty as to whether hosts of user-generated content are complying with the DMCA safe-harbor requirements, and whether they are therefore shielded from liability for copyright infringement.

II. LEGAL REGIMES

Before proposing a new, alternate regime to govern copyright for hosts of user-generated content, it is important to examine three existing regulatory regimes that could govern: ex ante regulation, ex post enforcement, and self-regulation. The goal in establishing a new, alternate regime is to maximize the benefits and minimize the disadvantages of each of these existing regimes.

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37. *Viacom*, 676 F.3d at 41–42.
38. *Id.* at 32.
39. *Id.* at 35 (quoting United States v. Aina-Marshall, 336 F.3d 167, 170 (2d Cir. 2003)).
41. *Viacom*, 676 F.3d at 36.
42. *Id.* at 38 (quoting Capitol Records, Inc. v. MP3tunes, L.L.C., 821 F. Supp. 2d 627, 645 (S.D.N.Y. 2011)).
43. UMG Recordings, Inc. v. Shelter Capital Partners L.L.C., 667 F.3d 1022, 1041 (9th Cir. 2011).
44. *Viacom*, 676 F.3d at 38.

A. EX POST ENFORCEMENT

Most regulation in the United States, particularly in the copyright field, is ex post.\footnote{See Samuel Issacharoff, Regulating After the Fact, 56 DEPAUL L. REV. 375, 377 (2007).} The DMCA prescribes a notice-and-takedown procedure for copyright infringement on the internet.\footnote{See 17 U.S.C. § 512(c) (2006).} The procedure allows creators of copyrighted content to inform a host of user-generated content that their copyrighted work is being infringed upon on the host’s website. To avoid liability for copyright infringement, the host must act expeditiously to remove the infringing work from its website upon receipt of the notice.\footnote{Id. § 512(c)(1)(A)(iii).} This system provides numerous benefits over the ex ante approach, though it also raises significant concerns.

1. Benefits of Ex Post Enforcement

Ex post enforcement provides several benefits over its ex ante counterpart. Unlike ex ante regulation, which seeks to issue blanket regulations before conduct occurs,\footnote{See infra section II.B.} ex post enforcement can be tailored to a specific bad act, can increase innovation by avoiding overregulation, and can incentivize legal compliance. In an industry such as peer-to-peer networking, a service like BitTorrent, which has substantial noninfringing uses,\footnote{See Felten, supra note 12.} can continue to exist while other services such as Napster, which has limited noninfringing uses, are shut down due to specific instances of copyright infringement.\footnote{See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).} Ex post enforcement gives online companies the freedom to innovate in any way they see fit, allowing them to attempt to create a better experience for users while simultaneously researching and implementing new ways to conform to legal requirements.
Furthermore, companies are likely to internalize legal compliance costs and avoid illegal activities because the threat of legal action looming in the background makes it more likely that they police their own actions and pass the costs of potential litigation on to their customers. By internalizing costs, companies are given the opportunity to regulate themselves in whatever way they determine is most beneficial from a business perspective. Finally, ex post enforcement allows the law to reflect changing technologies and adapt over time—as it has—by closing loopholes and ensuring that it provides the proper incentives to self-police.

2. Concerns Regarding Ex Post Enforcement

Ex post enforcement also raises significant concerns that suggest the need for a new legal regime for copyright on the internet. Ex post enforcement is both overinclusive and underinclusive with respect to the behavior it targets. It is overinclusive in that it punishes some legal activities in its attempt to prevent illegal activities, particularly when addressing the use of copyrighted material on the internet by entirely shutting down websites that contain both legal and illegal content. It is underinclusive because only illegal conduct that is brought before regulators or the courts is prevented. For example, in the last decade, the Recording Industry Association of America (RIAA) attempted to enforce its copyrights against individual infringers through lawsuits, but its efforts failed to keep up with widespread infringement problems and ended up creating significant public backlash against the RIAA. Furthermore, empirical evidence suggests that ex post enforcement is not working. Even with the DMCA’s notice-and-takedown provisions and the legal recourse currently available to the owners of infringed copyrights, as much as 23.8% of global internet traffic involves copyright infringement. Thus far, ex post enforcement has not been able to protect against copyright infringement in a significant way.

55. See id.
56. See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936–37 (2005) (finding an inducement theory of infringement liability despite Grokster’s substantial non-infringing uses). Prior to this decision, it might have been possible for a website to avoid liability for widespread, indirect copyright infringement on its service because of the service’s substantial noninfringing uses, even if the website had advertised the ability for its users to acquire infringing content. Id. The decision closed this loophole. Id.
57. See infra section II.A.3.
Ex post enforcement has additional drawbacks, including unpredictability and its associated costs. Though general legal standards exist, it is not always clear whether specific conduct complies with those standards, and it can take several years for the courts to provide clear guidance. For example, Grokster was able to successfully defend itself from contributory infringement and vicarious liability claims in both the district court and the Ninth Circuit before the Supreme Court found that an inducement theory applied to their actions. Fair use doctrine is particularly prone to uncertain outcomes because the DMCA provides four factors for courts to consider but includes no guiding principles for the factors. The unpredictability of copyright law leads to significant litigation costs for anyone seeking to defend its actions as noninfringing.

3. An Example of Ex Post Copyright Enforcement—The Megaupload Shutdown

The United States government’s efforts to shut down websites hosting and selling copyright-infringing materials (and counterfeit goods) accelerated in 2010 with the start of a new enforcement program called Operation In Our Sites. The program, administered by the National Intellectual Property Rights Coordination Center (under the auspices of U.S. Immigration and Customs Enforcement), targets websites that distribute pirated items over the internet and seizes the domain names, profits, and other property owned by the website operators, in addition to criminally prosecuting the website operators. One of the government’s largest domain seizures to date occurred when the Justice Department seized the website of Megaupload—a "cyberlocker"—in 2012, as

64. See Lisa Lerer, Viacom’s Expensive Suit, FORBES, Mar. 28, 2007, http://www.forbes.com/2007/03/27/youtube-viacom-google-tech-cx_ll_0328google.html (noting that the Viacom v. YouTube copyright infringement lawsuit could generate $350 million in legal fees, an amount greater than the $110 million in legal fees Microsoft paid for a five-year antitrust battle and the $200 million IBM paid for a thirteen-year antitrust battle); Joe Mullin, Uh-oh Veoh: Big Copyright Win Can’t Save Online Video-Sharing Company, CORPORATE COUNSEL (Mar. 4, 2010), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202445517277 (explaining that although the video-sharing service Veoh won the copyright lawsuit brought against it by the music company UMG, it was forced into Chapter 7 bankruptcy “in part due to the litigation costs racked up fighting the copyright battle”).
66. NAT’L INT’L PROP. RIGHTS COORDINATION CTR., supra note 65.
67. A cyberlocker is a third-party online service that provides file-storing and file-sharing services for various types of media files and data. Cyberlocker Definition, TECHOPEDIA, http://www.techopedia.com/definition/27694/cyberlocker (last visited Oct. 27, 2012).
part of the program. The United States accused Megaupload of costing copyright holders at least $500 million in lost revenue as a result of widespread infringement on its site. The Justice Department secured indictments against seven of Megaupload’s executives, including its founder, and shut down its servers. The shutdown caused a significant short-term drop in online file sharing, but it also revealed several flaws with ex post enforcement.

The most obvious problem with the Megaupload shutdown was its underinclusive nature. Although the seizure briefly curtailed copyright infringement, infringers ultimately shifted their activities to other similar overseas websites. Furthermore, of the estimated 17.5% of internet traffic in the United States that is infringing, only 12.5% of that is attributed to cyberlockers such as Megaupload. The Megaupload shutdown fell far short of solving the online infringement problem. But the ex post enforcement action was also overinclusive. Many of Megaupload’s users utilized its services to back up legal, noninfringing files, and the seizure prevented these users from accessing those files. Likewise, the seizure has significant implications for the rest of the cloud-computing industry—an industry that legally provides services allowing customers to store and share noninfringing files that its customers own—because it has created vague standards that make it more difficult comply with copyright law’s requirements.

68. Perry, supra note 45.
69. Id.
72. Putlocker, NovaMov, and MediaFire, all hosted in Europe, now service the majority of online file sharing. Id.
73. ENVISIONAL, supra note 59, at 3. This percentage includes all cyberlockers, such as NovaMov, and was based on the estimation that 90% of cyberlocker content is infringing. See id. Including video-streaming sites, which includes Megaupload’s video site Megavideo, the total percentage of infringement coming from these sources could be as high as 21.2%. Id. A majority of infringement in the United States is done using BitTorrent and other peer-to-peer services. Id.
75. See Mike Masnick, How the Megaupload Shutdown Has Put “Cloud Computing” Business Plans at Risk, TECHDIRT, Feb. 17, 2012, http://www.techdirt.com/blog/innovation/articles/20120216/03595717776/how-megaupload-shutdown-has-put-cloud-computing-business-plans-risk.shtml (indicating that the “vague standards” that provided the basis for the Megaupload indictment could be applied to other cloud-computing services, such as Dropbox).
B. EX ANTE REGULATION

The use of ex ante regulation in the United States is fairly limited. However, it does exist. For example, the Food and Drug Administration makes determinations on the legality and marketability of pharmaceutical products before they ever reach the market, thereby maintaining tight control over the behavior of pharmaceutical companies. Similarly, since the Hart–Scott–Rodino Act was passed in 1976, the government has wielded its merger control powers ex ante by requiring preapproval for mergers above a certain size, thus allowing it to prevent mergers with potential antitrust implications from ever occurring. To evaluate whether an ex ante legal regime would be a useful way to regulate internet content and copyright infringement, we must weigh its benefits and costs.

1. Benefits of Ex Ante Regulation

Because ex ante regulation centers on speculation rather than fact, its overall benefits are difficult to quantify except as a means of preventing future behavior. But there are two benefits that ex ante regulation provides to companies trying to comply with the law. The first is clarity. Any rules that a company must comply with are stated up front, and a company’s failure to comply results in it being unable to compete in the industry, regardless of the likelihood that it will go on to violate the law. Clarity provides a significant benefit to companies that comply with the rules because they no longer need to be concerned about whether they have exceeded their legal authority or about the specter of future liability.

A second, related benefit of ex ante regulation is fewer litigation costs. Though the upfront costs of complying with the regulations might be greater, companies may devote fewer resources to defending their practices against

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76. See Issacharoff, supra note 48, at 377–79.
77. Id. at 378.
subsequent lawsuits.83 This, in turn, allows companies to more efficiently allocate their resources because less will be devoted to fighting lawsuits.84 Furthermore, by ensuring predictable outcomes in future legal conflicts, this regime enables a corporation to anticipate the liability it may face when it makes specific business decisions.85

2. Costs of Ex Ante Regulation

Unfortunately, ex ante regulation has its own significant drawbacks. First and foremost, ex ante regulation stifles freedom and innovation, which is of particular relevance in the context of the Internet.86 Establishing regulations prior to behavior in order to control that behavior limits what market participants can create87 and potentially hinders a business’s ability to compete by limiting the ways in which it can react to market demand or changes.88 Attacking behavior before it occurs may also raise First Amendment free-speech and prior-restraint concerns.89

Second, regulatory regimes that apply to all industry competitors, regardless of the specifics of a particular case, are highly likely to be inefficient, over-regulating some companies and underregulating others.90 This drawback is due to an informational problem: regulating behavior ex ante leaves regulators in the dark on exactly how companies will misbehave in the future.91 A third concern raised by ex ante regulation, particularly as applied to copyright, is that content creators are able to claim fair use.92 Fair use allows creators to use portions of copyrighted works without the original creator’s permission.93 Because of this permitted use, a blanket regulation preventing any use of copyrighted works by websites would be impractical.


84. See Zhiyong Liu & Ronen Avraham, Ex Ante Versus Ex Post Expectation Damages, 32 Int'l Rev. L. & Econ. 339, 350 (2012) (finding that ex ante expectation damages are more efficient than ex-post actual damages in contract disputes, partially as a result of litigation costs).


86. See Bart Schermers, Contr. for European Studies, Freedom in the Days of the Internet 74–77 (2010).


88. See Schermers & Wagemans, supra note 86, at 11.


90. See Kolstad et al., supra note 81, at 889.


93. Id.
3. An Example of Ex Ante Regulation—Internet Censorship Around the World

Government censorship of internet content is the most basic form of ex ante internet regulation. The best example comes from the United Arab Emirates (UAE), where the government filters content at the national level, through its internet service provider Etisalat. Prior to 2009, if a website was in the Israeli top-level domain (.il), the website would be blocked in the UAE, regardless of the website’s content. Although this blanket censorship of Israeli websites has since been lifted, it demonstrates how ex ante regulation of internet content might be implemented.

The democratic ideals fundamental to the political system in the United States would make it more difficult to install the UAE’s form of blanket censorship in this country. However, a regime proposed (though not implemented) in Australia provides an example of a censorship program that might be implementable in a Western democracy like the United States. The proposed program would not be an entirely ex ante regime; unlike a blanket rule preventing access to all websites (or all websites of a particular type), an individual website would only be placed on a blacklist after there became a reason to suspect that it contained inappropriate materials. Once the Australian Communications and Media Authority identified a suspect website—either at the suggestion of internet users or through its own investigation—and placed it on the blacklist, Australian internet service providers would be required to

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94. It is worth noting that China may have a more well-known censorship program, but the program has a low level of transparency. See Ronald J. Deibert, The Geopolitics of Internet Control: Censorship, Sovereignty, and Cyberspace, in ROUTLEDGE HANDBOOK OF INTERNET POLITICS 323, 332 (Andrew Chadwick & Phillip N. Howard eds., 2009). Thus, for the purposes of this Note, the UAE censorship program offers a better example of ex ante regulation.

95. See id.


98. OPENNET INITIATIVE, supra note 96, at 10.


100. Unlike the federal monarchy in the UAE, the United States federal government would likely be unable to censor individual access to internet content in such a sweeping manner because of Constitutional provisions such as the First Amendment. See U.S. CONST. amend. I.

101. See Derek E. Bambauer, Filtering in Oz: Australia’s Foray into Internet Censorship, 31 U. PA. J. INT’L L. 493, 503 (2009). Australia’s attempt to filter is an example of how an ex ante structure could regulate the Internet. However, this exact type of regulation would be unlikely to succeed in the United States, because unlike in the United States, Australia’s constitution does not guarantee freedom of speech. Id. Rather, the freedom is derived from Australia’s democratic process, providing less judicial oversight of government policies that touch on free speech. Id.

prevent access to the website. Though the blacklist’s creation would involve some ex post considerations, this impact on content access would be consistent with the results expected from an ex ante regime. Much like a person is unable to access a pharmaceutical drug that does not meet the FDA’s ex ante safety requirements, an Australian internet user would not be able to access a website that contained inappropriate content. Website creators would be aware of the general prohibitions and would therefore conform to the Authority’s requirements to avoid being placed on the blacklist and to ensure that their users retained access to their websites. The positive effects of such a regime, as mentioned above, would be clarity and certainty. All market participants, including both content hosts and users, would be aware of the requirements before they acted and would know in advance exactly which websites would be blocked.

But Australia’s plan also exposes the problems with ex ante regulations. Aside from the obvious freedom of expression issues that this plan would implicate, there is also the concern that the policy would be overbroad and block more than it should. A leaked version of the proposed blacklist revealed that nearly two-thirds of websites filtered by the Australian government would be legal for adults to access. Furthermore, though the policy was intended to prevent all Australians from accessing certain websites, the technology behind the policy would have made it possible for motivated users to circumvent the censorship. These example of government censorship abroad cast doubt over whether an ex ante regulatory regime could succeed in governing copyright on the internet.

C. SELF-REGULATION

Self-regulation allows market participants to control their own behavior. Due to the decentralized nature of the internet, self-regulation is sometimes thought to be the most effective method of controlling conduct. Though often the weakest of the three types of legal regimes (in many cases the government...
does not step in to enforce the self-imposed rules), 110 self-regulation offers benefits and costs worth considering when crafting an alternative standard for copyright on the Internet.

1. Benefits and Costs of Self-Regulation

The most important benefit of self-regulation, particularly in the internet context, is its flexibility. 111 The Internet is constantly evolving; of the ten most visited websites in the United States as of June 2012, five did not exist when the DMCA was passed. 112 By leaving regulation in the hands of market participants, industry requirements can more easily adapt, as needed, to protect the various companies. Furthermore, self-regulation is less costly for the government because neither the government nor the court system needs to financially support regulation and enforcement. 113

However, self-regulation comes with disadvantages as well. 114 First, and of particular relevance to the regulation of copyright on the Internet, is the possibility of underregulation. 115 If the regulatory regime were left completely in the hands of websites that host user-generated content, it could promote, rather than disincentivize, the infringement of copyrighted works because hosts would want to provide, rather than prevent, free access to copyrighted works to increase visitor traffic, thereby increasing its market share and power. Second, self-interested parties might promote regulations that benefit themselves over others, leading to overregulation. 116 For example, websites that already have significant market share and make a sizeable profit might hold more sway in defining industry regulation and might be willing to adopt more stringent standards that make it difficult for upstart competitor websites to comply. 117 The risk of underregulation would be particularly problematic in a regime that self-regulates hosts of user-generated content because the most visited websites—

111. See id. at 268.
113. See Priest, supra note 108, at 270.
114. This Note focuses on the problems of overregulation and underregulation. For more on the advantages and disadvantages of self-regulation, see id. at 268–74.
115. See id. at 272.
116. Id.
117. Several major internet companies, including Google and Facebook, have gotten together to create the Internet Association, a lobbying group that represents “the interests of America’s leading Internet companies and their global community of users.” INTERNET ASSOCIATION, http://internetassociation.org/ (last accessed Nov. 3, 2012).
such as YouTube—command a significant web presence, both in traffic and reputation.

2. An Example of Self-Regulation—YouTube’s Content ID Program

In 2007, in an attempt to fend off copyright infringement claims and provide management rights to copyright holders, YouTube announced a self-imposed video fingerprinting scheme. Called “Content ID,” the digital fingerprinting software helps YouTube recognize copyrighted audio and video contained within a user’s uploaded video. It allows copyright holders to submit their works to a database and gives the holders three choices for how to deal with uploaded content that matches their work: monetize the content, track usage, or block the content altogether.

Though this self-reporting scheme has its benefits, including providing YouTube with a system that automatically monitors for misuse of copyrighted content, some flaws prevent it from potentially being expanded to form the basis of a new regulatory regime for all user-generated content hosts. First, the identification process is owned and created by Google (owner of YouTube), and is more advanced than the average video recognition systems. Other hosts of user-generated content, particularly recently launched websites, may not have the funds or knowledge base necessary to create their own identification system. Second, the Content ID software has reportedly prevented the legal fair use of copyrighted works and has matched random un-owned sounds—such as birds, a motorcycle, and ocean waves—to copyrighted materials in its database. Until these concerns are addressed and the state of technology reaches the point that a filtering system is cost-effective and accurate, it would be impractical to require this technology as part of a self-regulatory copyright regime.

118. See ALEXA, supra note 112.
119. See David Karlins & Doug Sahlin, The Difference Between a Website and a Web Presence, DUMMIES.COM, http://www.dummies.com/how-to/content/the-difference-between-a-website-and-web-presence.html (last visited Nov. 3, 2012) (giving instructions to website operators on how to create a web presence by using websites such as YouTube and Facebook).
122. See id.
125. Chris Morran, Is YouTube’s Content ID System Leading to False Copyright Claims?, CONSUMERIST (Feb. 27, 2012, 12:45 PM) (on file with author).
III. A NEW LEGAL REGIME FOR HOSTS OF USER-GENERATED CONTENT

The uncertainty created by the current system of copyright regulation, the costs associated with this uncertainty, and the widespread infringement that occurs on the Internet\textsuperscript{126} suggest the need for a new regulatory regime. However, the three existing options—ex-post enforcement, ex-ante regulation, and self-regulation—each fall short of effectively allowing websites to legally provide content while protecting the rights of copyright owners.\textsuperscript{127} The question thus becomes whether there is a better system to govern these issues. This Part proposes such a system. Section A proposes a new, opt-in regulatory regime for hosts of user-generated content that seeks to protect hosts from legal uncertainty and high legal costs while also providing economic benefits to copyright holders. Section B identifies the benefits that this regime offers. Finally, section C considers some of the limitations of this regime.

A. AN ECONOMIC “OPT-IN” SAFE-HARBOR PROVISION

To avoid some of the pitfalls that come with an ex post regime, I propose a new, alternative regime for regulating possible copyright infringement by hosts of user-generated content. The goal of this regime is to combine some of the advantages of ex ante regulation and self-regulation in order to defeat some of the disadvantages of ex post enforcement. Rather than attacking infringement after the fact, this regime would seek to monetize infringement before it occurs, providing copyright holders with an economic benefit for the use of their work in other content. This new regime would not replace the existing safe-harbor provisions. Rather, it is an alternative regime to the current ex post system. The regime has four features. First, it would be an opt-in safe harbor. Second, it requires a centralized database with digital fingerprinting. Third, it creates a compulsory royalty fee. Fourth, it provides immunity to hosts of user-generated content without the need for notice-and-takedown measures.

1. Opt-In Provision

The proposed alternative safe-harbor provision would be “opt-in,” meaning that websites would have to affirmatively choose to be governed by this regime. Those that decide not to opt-in would continue to be governed by the infringement laws and DMCA safe harbors currently provided. The opt-in nature of the provision is preferable to an opt-out regime both because it would be easier to police and because it would not alter the status quo. In addition, only those companies that chose to accept the protections of the opt-in regime would bear the costs of adoption. The decision would be made by hosts of user-generated content, not the copyright owners or content creators. Thus, this safe-harbor

\textsuperscript{126} See supra Part I.
\textsuperscript{127} See supra Part II.
provision is limited in its application to only hosts of user-generated content; other potential copyright infringers would not be protected by this regime.

2. Centralized Database with Digital Fingerprinting

The regime would require hosts of user-generated content to process uploaded material using digital fingerprinting technology, similar to YouTube’s Content ID.128 It would also require copyright holders to submit their copyrighted works to a central database. The database would be overseen by a central organization, such as the U.S. Copyright Office.129 In addition to selecting which content to submit to the database, copyright holders would be given several options for how to handle user-generated content that matches the copyrighted works. Copyright owners could choose to have no action taken, to receive notice that a match has occurred, to require an advertisement for the original material to be displayed with the user-generated content, or to require payment for the use of a match (collectively “usage selections”).

The safe-harbor provision would not require hosts of user-generated content to offer copyright holders the option of blocking all use of their copyrighted materials.130 Because individuals are entitled to fair use of copyrighted works without infringing on those copyrights,131 this type of blanket provision would be impractical from a regulatory standpoint. While individual websites such as YouTube could choose to provide copyright holders with the option of blocking content that matches their copyrights, requiring websites to offer the takedown option as part of the economic safe-harbor regime itself would violate a user’s right to fair use. Currently, a copyright holder cannot prevent a user from engaging in the fair use of a copyright holder’s work132—and any change to existing fair use laws would be ill-advised under this new opt-in regime for two reasons. First, this proposed safe-harbor provision is only one possible safe-harbor for hosts of user-generated content, whereas fair use affects all copyrighted content, including content that falls under a different safe-harbor provision or content that does not involve hosts of user-generated content. Second, fair use affects the primary creation of content, whereas this regime is intended

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128. See supra notes 121–22 and accompanying text. Many hosts of user-generated content already use digital fingerprinting technology. See Gallo, supra note 26, at 294–300.

129. The U.S. Copyright Office is the unit within the Library of Congress that administers copyright law. United States Copyright Office: A Brief Introduction and History, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/circs/circ1a.html (last visited Nov. 3, 2012). Among the roles of the U.S. Copyright Office are maintaining copyright records, administering the mandatory deposit provisions of copyright law, and administering the compulsory license provisions of copyright law, including collecting royalties. Id.

130. YouTube’s Content ID program offers this option, which prevents any user-generated content containing “blocked” copyrighted works from being hosted on the website. See YOUTUBE, supra note 121.


132. See id.
only to offer a safe harbor for hosts of user-generated content from indirect infringement liability.

3. Compulsory Royalty

The option to require payment is the primary difference between this regime and the current policy already followed by YouTube.133 The government would establish a standard fee for any use of copyrighted content in its database, and if a user’s submission were to match content for which a copyright holder has requested a fee, the website would be required to pay the fee to the copyright holder. The fee would apply only to videos when uploaded. (The number of views would be irrelevant to the fee.) The fee per uploaded video would need to be small, in order for it to be economically feasible for websites to adopt this safe-harbor provision. The compulsory license regime currently available to those who use copyrighted nondramatic musical works provides a good model for how such a fee would work.134 Under that regime, any person who first complies with certain additional statutory requirements135 and then pays a licensing fee established by Copyright Royalty Judges is entitled to make and distribute phonorecords of covered nondramatic musical work.136 Any work that has been distributed in the United States under authority of the copyright owner automatically falls under this regime and is subject to a compulsory license.137 Although the fee changes over time, it is currently set at 9.1 cents per song or 1.75 cents per minute of playing time, whichever is larger.138 The flat rate of 9.1 cents per song could provide a starting point for determining the fee that hosts of user-generated content would have to pay copyright holders under the new regime proposed by this Note.139 As in the compulsory license regime, Copyright Royalty Judges could be given the power to adjust these rates, as necessary after hearing evidence presented by both hosts of user-generated content and copyright holders.140

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133. YouTube’s Content ID program allows only content owners to make money, receive statistics, or block the content from the website. See YouTube, supra note 121.
135. Requirements such as notice to the copyright owner are necessary to obtain a mechanical license, but are not part of the proposed safe-harbor provision detailed in this Note. See id. § 115(b).
136. Id. §§ 115(a)(1), 115(c)(3), 801(b)(1). “Nondramatic musical work” is not defined in the statute. Id. Three Copyright Royalty Judges are appointed by the Librarian of Congress to comprise the Copyright Royalty Board. Id. § 801. These judges make all determinations related to royalty rates under copyright law. Id.
137. 17 U.S.C. § 115(a)(1). Compulsory licenses apply only to the musical composition, not the actual sound recording itself. Id.
138. 37 C.F.R. § 385.3(a) (2011). Ringtones, limited downloading, and interactive streaming have different rates. See id. §§ 385.3(b), 385.10–17.
139. Whether this exact amount provides the best possible fee for both parties is beyond the scope of this Note, but an independent study could be conducted prior to the enactment of this safe-harbor provision to determine the best possible fee for such a regime.
4. Immunity Without Notice and Takedown

In exchange for agreeing to offer copyright owners the required payment option, hosts of user-generated content that opt in to this new regime would no longer be subject to the safe-harbor provisions of § 512(c), including the notice-and-takedown requirement.\textsuperscript{141} A host of user-generated content would no longer be required to monitor its content after the fact because it would agree in advance to pay copyright holders for any use of their copyrighted material. Instead, the host would be held to the standards of the new safe-harbor provision—namely, that the filtering system sufficiently matches uploaded content to copyrighted content, and that the website is abiding by the copyright holder’s usage selections. If the host of user-generated content were to fail to adequately meet these requirements, it would then be liable for both indirect and direct infringement, just as any service provider could be liable for infringement if it fails to satisfy other safe-harbor provisions.\textsuperscript{142} Furthermore, this safe-harbor would only protect the host of user-generated content; individual users who upload copyrighted material could still be held liable for infringement.\textsuperscript{143}

B. ADVANTAGES OF THE ECONOMIC SAFE-HARBOR ALTERNATIVE

There are many benefits that would come from this additional copyright regime for hosts of user-generated content. First, in the wake of the recent Second Circuit decision in Viacom v. YouTube,\textsuperscript{144} this regime would enhance clarity for content hosts. Second, it would curtail costs that the ex post enforcement regime imposes in terms of litigation and the notice-and-takedown requirement. Third, it would incentivize the sharing of information through use of a centralized database because copyright holders would be unable to collect fees without submitting their works to the database. Fourth, it would promote innovation because companies would compete to produce greater filtering software. Fifth, it would monetize the widespread problem of copyright infringement on the internet, thereby minimizing the losses of copyright holders and providing them with economic benefits that might not otherwise be available.

1. Clarity

The greatest benefit that this economic safe-harbor would provide is clarity, for hosts of generated content as well as copyright holders. Like ex ante regulation, hosts of user-generated content would know in advance whether their conduct complies with the law. If a website contained a digital fingerprinting system and abided by the copyright holder’s usage selection, the website would be free from liability for copyright infringement. This would close the door that Viacom v. YouTube opened for liability arising out of willful blindness.

\textsuperscript{141} Id. § 512(c).
\textsuperscript{142} Id. § 512(a)-(d).
\textsuperscript{143} Id. § 501.
\textsuperscript{144} Viacom Int’l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012).
or the ability to control content under § 512(c).

Instead, by requiring a payment to copyright holders upon a match of copyrighted content, hosts of user-generated content would essentially be paying a levy to cover infringement on their website. Furthermore, for those copyright holders less concerned about money and more concerned with preventing the spread of their works via third parties, the safe-harbor would apply only to the host itself. Copyright holders could still file direct infringement lawsuits against the individual user who posted the infringing content.

By requiring hosts of user-generated content to opt into the regime, the economic safe-harbor regime would also deal with the problem of uncertainty in determining fair use. By opting in, websites would accept the financial burden of paying when its users utilize copyrighted content, even if it would normally be considered fair use. Though the fair use of these copyrighted materials is free in an ex post regime and the users are not liable for infringement, hosts of user-generated content would agree to pay the additional cost for their use in exchange for the clarity of knowing what hosted material is copyrighted and what is noncopyrighted. If content is copyrighted, the website would have to pay. If it were not copyrighted, no payment would be required. Unlike other proposed ex ante regimes, such as the best available technology standard proposed by Helman and Parchomovksy, which would require the technology to be able to differentiate between fair use and infringement (or require human interaction to make the determination), the economic safe harbor would not be concerned with whether a use is fair.

2. Costs

The economic safe-harbor regime would also eliminate costs associated with the ex post enforcement regime—namely, litigation costs and notice-and-takedown costs. The blanket “payment for copyrighted materials” rule would eliminate the need for hosts of user-generated content to designate an agent to receive notices and expeditiously take down infringing content. The fee paid by the website would grant them the right to continue hosting the infringing content. Furthermore, litigation costs would likely drop. Although the likelihood of litigation against content hosts would be low under the economic safe-harbor

145. Id. at 41–42.
146. Id.
149. Id.
regime, there would be fewer situations in which litigation could occur. Litigants could only bring claims related to a website’s filtering system (which, if litigated successfully once, would likely prevent future lawsuits on the issue) or a website’s failure to comply with the copyright holder’s usage selection. This would presumably lead to significantly less litigation than § 512(c), which allows for copyright litigation over, among other things, claims related to a host website’s knowledge, expeditious takedowns, ability to control, and willful blindness.151

3. Information Sharing

Under the economic safe-harbor regime, copyright holders would have significant financial incentives to provide their copyrighted works to the centralized database. If these owners chose not to share their information, they would lose out on the monetary benefits of the regime. These copyright holders might also lose out on any legal recourse because the hosts that opted in would likely claim that they abided by the owner’s usage selection, which would be nonexistent if the owners did not add the necessary information to the database. Thus, the opt-in system places a burden on copyright owners to proactively protect their copyrights ex ante. This is similar to the current copyright system, which requires copyright owners to police internet content and report any infringement to hosts of user-generated content,152 except that copyright owners would only need to report their copyrighted works once rather than constantly searching for any infringing works. Assuming the information in the database is accurate and current, copyright holders would receive the monetary benefits to which they are entitled.153

4. Innovation

The economic safe-harbor regime would have the additional benefit of promoting innovation, both in the development of digital fingerprinting technology and in the creation of new websites. First, hosts of user-generated content would be more likely to invest in and improve the digital fingerprinting technology in order to ensure that they comply with the safe-harbor provision. Though this innovation could be costly,154 that the regime is opt-in means that only those firms with the means to efficiently fund and implement filtering software would do so. The economic safe-harbor regime would not require the best filtering technology available; it would merely require technology that is able to sufficiently match copyrighted materials from the centralized database to the uploaded content.155 Sufficiency could be left for the courts to decide, but this

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152. See 17 U.S.C. § 512(c).
153. See Helman & Parchomovsky, supra note 148, at 1227.
154. See Katyal & Shultz, supra note 89, at 88.
155. See id. at 95 (noting that one concern with Helman & Parchomovsky’s best available technology standard is that it is difficult to determine what the “best” filtering system would be).
would negate the benefits that the new regime would provide by cutting down on litigation, and it would place technological decisions in the hands of judges who may not be well-equipped to make these decisions.\footnote{156} Instead, an agency of the U.S. Copyright Office would be best suited to make these determinations because they have the necessary expertise in the field and would more easily adapt to changes in technology than the courts.\footnote{157}

Second, the regime would support the creation of new websites. Any website that was concerned about proper compliance with § 512(c) would able to opt into a regime that, as noted,\footnote{158} provides clarity and limited ex post costs as compared to other copyright regimes. This clarity would incentivize innovation.

5. Monetization of Infringement

Copyright infringement on the Internet is a widespread problem,\footnote{159} and when infringement occurs, it means that copyright holders are not being paid for their creations. The economic safe-harbor regime would provide these copyright holders with an opportunity to make money off of this infringing conduct by choosing to require advertising or payment for use of a match.\footnote{160} In addition, it would allow hosts of user-generated content to internalize the costs of hosting possibly infringing content. Hosts could decide either to pay the required fees themselves (funding the cost through external sources such as advertising, which may be significant if the site is able to remain free for users) or to pass the cost on to users as a fee (through a “premium” account or similar methods).\footnote{161} If a host felt that the costs were too high and that neither option was feasible, it could simply choose not to opt in to the economic safe-harbor regime. Furthermore, the regime would address the concern that it might not benefit society to prohibit ex ante all infringing content from reaching the internet.\footnote{162} By providing payment in exchange for the use of the copyrighted material, any societal benefit that arises from hosting the infringing material would remain. Additionally, the payment itself would provide economic benefit to those who created the original content. For these reasons, the economic safe-harbor regime has several benefits similar to those created by ex ante, ex post, and self-regulation regimes.

\footnotesize{156. See Helman & Parchomovsky, supra note 148, at 1223–24.}
\footnotesize{157. Id. at 1224–25.}
\footnotesize{158. See supra sections III.B.1–2.}
\footnotesize{159. In the United States, more than 17% of internet traffic is infringing. ENVISIONAL, supra note 59, at 2–3. Globally, the percentage is almost 24%. Id.}
\footnotesize{160. See supra section III.A.}
\footnotesize{162. See Katyal & Shultz, supra note 89, at 89–90.}
C. DISADVANTAGES OF THE ECONOMIC SAFE-HARBOR ALTERNATIVE

Although there are numerous benefits to the economic safe-harbor regime, it has disadvantages as well. First and foremost, this regime would put a limit on copyright holders’ rights because any host of user-generated content would not be subject to takedown requirements, meaning that copyright holders would be unable to remove infringing works from these websites. Second, the costs (both for copyright enforcement generally and for hosts of user-generated content) could be significant, and the corporations that run these websites might be unwilling to accept the costs. Third, some matching uses might not be infringing, resulting in payments that would otherwise not be required. Fourth, the regime could lead to more widespread infringement. Fifth, various reactions to the regime could render it ineffective.

1. Limits on Copyright Holders’ Rights

Although the economic safe-harbor regime would monetize infringement or give copyright holders the option of being notified of user-generated content matches involving their original works, it would provide no injunctive relief for copyright holders. There would be no mechanism for copyright holders to require hosts of user-generated content to take down infringing works. This might not be a significant concern because content creators would receive payments for the use of their works. However, those who want to control the dissemination of their works would be unable to prevent websites that opt into the regime from hosting infringing content.

Even without the ability to seek injunctive relief against hosts of user-generated content, copyright holders would have several options for enforcing their rights. One method would be to enter into private agreements with hosts of user-generated content. The safe-harbor provision does not attempt to alter free market transactions or contract law, and copyright holders who wish to enforce their rights against a host of user-generated content could do so if they have a contractual agreement that has been violated. For example, copyright holders might be willing to contract for a smaller payment than the proposed regime-mandated royalty, or a flat fee, in exchange for the right to retain greater control over their work on a particular website. In addition, the proposed safe-harbor provision would do nothing to prevent a copyright holder from suing a user who illegally uploaded its copyrighted work under a direct infringement theory. By filing this type of lawsuit, a copyright holder could receive an injunction requiring the removal of the offending content from a hosted website. Thus, copyright holders would have alternative methods for enforcing their rights under the law.

163. This would be a breach-of-contract issue. See, e.g., In re Aimster Copyright Litigation, 334 F.3d 643, 646 (7th Cir. 2003) (stating that “a copyright license is just a type of contract”).
165. Id.
2. Costs

Although the economic safe-harbor regime would limit litigation costs, it would do so by requiring hosts of user-generated content to pay significant usage costs in addition to adopting potentially costly filtering technology. The question arises as to why websites would agree to accept the financial burden of maintaining copyrights when the basis of the current copyright regime is that copyright holders bear the financial burden of policing infringement. The economic safe-harbor regime does not provide an answer to this question. The difference between this regime and others, such as the best available technology standard proposed by Helman and Parchomovsky, is that it would not replace existing safe-harbor provisions. Rather, it is an alternative regime to the current ex post system. If no websites chose to opt in, there would be no additional cost. Hosts of user-generated content would only opt into this regime if they decide that it would be in their own best interest, financial or otherwise, to do so. The voluntary nature of the opt-in regime limits the negative impact of associated costs. Additionally, the regime would allow hosts of user-generated content who opt in to enter into contractual agreements with content creators, which would lead to lower implementation costs for the hosts of user-generated content. Hosts could offer competing terms to copyright holders, with some increasing the copyright protection they would be willing to provide in exchange for lower payments. Thus, hosts of user-generated content could further limit the costs of the proposed regime.

There is also an organizational cost concern related to the creation and operation of a centralized database for copyrighted material. Currently, content creators are not required to register their works with the U.S. Copyright Office in order to secure copyright protection, though registration is required in order to bring suit for infringement. Establishing this economic safe-harbor regime would essentially require copyright owners to register their works or risk losing the monetary benefit. Additionally, the database would also have to be overseen and maintained. Although the U.S. Copyright Office would be the natural choice for a monitor, both economics and timing could prevent that agency from being able to control the database. The cost of making data available in real time to all hosts of user-generated content and the expense of storing the copyrighted works in the database could be significant. Whether the U.S. Copyright Office or another agency is best suited for maintaining the

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166. See Katyal & Shultz, supra note 89, at 85 (noting that the current copyright regime allows hosts of user-generated content to wait until they receive a valid notice to act, thereby placing the burden of discovering infringing content “squarely on copyright holders or their agents”).
169. See id. §§ 411(a), 412.
170. See Katyal & Shultz, supra note 89, at 95–96.
central database would need to be determined before the regime could be adopted.  

3. Noninfringing Uses

The economic safe-harbor regime would require payment for the use of copyrighted materials, regardless of whether the use is infringing. This would provide some needed clarity to the copyright law regime, and it would also cause one of the standard pitfalls of ex ante regulation: ineffectiveness through overinclusiveness. Although the regime would add clarity to fair use law, it might also result in copyright holders being overcompensated because hosts would have to provide compensation even for fair use content, which would otherwise not require compensation. Additionally, the system could result in a copyright owner getting paid twice for the same use of its work. For example, if a copyright owner were to make an arrangement with a user, such that the user paid the copyright owner for the right to use and upload its work, the host of user-generated content would also still be required to pay the owner because the content would still match the copyrighted work in the database. One way to avoid this double payment would be to allow copyright holders or users to specify that a user has been granted permission to use the copyrighted work. However, neither the copyright holder (who would be paid twice) nor the user (who is not involved in the payment by the host, unless those costs have been passed on to the user) have any incentive to provide the host with this information, unless the host makes notification of permission a condition of using its service. Thus, the host of user-generated content might have to pay for the use of copyrighted materials even if there were no infringement and the copyright holder had already been compensated.

Although the regime would create the possibility of overcompensation to copyright holders, both due to payments for content that would otherwise be fair use and due to double payment for content created as a result of a private agreement between copyright holders and users, this payment can be thought of as a “cost of clarity.” These additional costs would be born solely by the hosts of user-generated content; they would be the ones paying for what would otherwise not require payment. But because opting into the safe-harbor provision would be their choice, the hosts of user-generated content could make their own determination as to whether these extra costs would likely be small enough.

171. For more on the advantages and disadvantages of using a centralized database for copyrighted materials, see Helman & Parchomovsky, supra note 148, at 1219–23.
172. See supra section II.B.2.
173. See supra section III.B.1.
174. This double-payment problem is less of a concern for databases like the one maintained by YouTube because, under the existing notice-and-takedown system, claiming that a user has permission is not required unless a takedown request is submitted, at which point the user can either request a retraction from the copyright holder or submit a counter-notification. See Copyright Strike Basics, YouTube, http://support.google.com/youtube/bin/answer.py?hl=en&answer=2814000&topic=2778545&ctx=topic (last visited Feb. 20, 2013).
to allow them to reap the other benefits of the regime, such as clarity. If there are fewer uploads of noninfringing content, due to fair use or permission, than of infringing content, then adopting the new regime and paying “extra” for these few works to avoid liability on a larger scale may be economically beneficial for certain hosts of user-generated content.

4. Additional Infringement

The economic safe-harbor provision could also lead to additional infringement, rather than less infringement. As a percentage of internet traffic, infringement would likely increase. In addition to allowing currently infringing content to remain on the Internet, there would be nothing to prevent additional infringement from occurring. If hosts of user-generated content decided not to pass down the regime’s costs to users and were willing to pay the fees themselves, the only limit to the amount of infringement that could occur would be the cost that the website could afford. However, if costs became too significant, websites would likely begin to self-regulate in order to limit the amount of infringement for which they needed to pay. Furthermore, any infringement that did occur would be monetized, allowing copyright holders to collect fees as a result of the infringement. Thus, even if infringement were to increase as a result of this regime, it is not clear how much it would increase, nor whether there would be any negative effects on society as a result, because copyright holders would still be compensated for the use of their works.

5. Ineffectiveness

One final disadvantage of the new safe-harbor provision would be fear of its ineffectiveness. There is no guarantee that adopting such a provision would have any effect on copyright infringement on the Internet. In particular, three ineffectiveness concerns arise from the proposed regime. First, there is a possibility that few, if any, websites would choose to opt into the new regime. Due to the opt-in nature of the regime, hosts of user-generated content would need to take affirmative steps in order to gain the protection of the safe-harbor, which could limit participation. However, wide-scale participation would not be required to make this safe-harbor provision effective. Unlike other proposals, this new safe-harbor provision would supplement the current system, not replace it. Therefore, there would be no change in the status quo. At a minimum, hosts of user-generated content would remain protected by the other safe-harbor provisions. Thus, this new proposed regime would only add effectiveness to the current system, because hosts of user-generated content would be provided

175. See generally Helman & Parchomovsky, supra note 148, at 1212–29 (proposing a “technological safe-harbor” to replace the current safe-harbor provision found in 17 U.S.C. § 512(c), whereby hosts of user-generated content would be “exempt from monetary liability if they can show that they employed the ‘best’ filtering technology available on the market when the alleged infringement occurred”).
with additional protection if they chose to opt in. Even if only one host of user-generated content were to opt in to the new regime, the regime would still be effective because that host would reap the benefits of the provision’s protection and copyright holders would be better compensated for their works.

A second concern is that, if hosts of user-generated content were to pass the costs of the legal regime onto their users, the user base would leave the costlier websites for alternative sites that were cheaper because they chose not to adopt the regime and its associated costs. A smaller user base could force hosts of user-generated content to shut down, making it less likely that these hosts would accept the protections of the new provision in the first place. However, there are two reasons that this would be unlikely to occur. First, although it might cost more to use a host of user-generated content that opts in to this safe-harbor provision, the host’s users would benefit by having more freedom over what content they upload. On a website that did not opt into this regime, a video might be rejected or removed because it contained copyrighted content, or the entire website might be seized by the government, and its content eliminated, if the website refused to comply with the DCMA. 177 On the other hand, if a website opted into this regime and passed the costs down to the user, it would post any video that a user uploads because the host would not be liable for infringement. Thus, a user wishing to ensure that his or her video was published and remained on the internet would likely gravitate toward websites that adopt this protection. Second, some hosts of user-generated content might choose not to pass down costs to their users if they feel that a large user base is worth more to them than internalizing the costs of the regime. A larger user base could increase advertising revenue, and a parent company might derive additional benefits from a subsidiary host of user-generated content in the form of overall increased traffic to its user-generated content services. 178 Both of these reasons make it unlikely that this new legal regime would have a negative impact on the size of a host’s user base.

Finally, there is a concern that this regime could lead competitors to engage in economic warfare. Employees of one firm might seek to exorbitantly drive up a competitor’s costs by posting copious amounts of infringing works to its website. If enough content were uploaded, the costs could become too large for the competitor to absorb, forcing the competitor out of the market entirely. However, the proposed regime would not seek to control a host of user-

177. See supra section II.A.3.
178. For example, YouTube creates much more value for its parent company, Google, than just the profit it makes or the losses it incurs on its own. See Google—How (Precisely) It Profits from YouTube, Telco 2.0 Research, http://www.telco2research.com/articles/AN_google-internet-behemoth-youtube_full (last visited Jan. 12, 2013); YouTube: Google’s Phantom Loss Leader, RampRate (Jun. 17, 2009, 9:59 AM), http://ramprate.wordpress.com/2009/06/17/youtube-google%E2%80%99s-phantom-loss-leader/. YouTube increases traffic to Google’s other websites, which attracts more advertising revenue and improves its overall advertising platform economics, all while lowering infrastructure costs, such as acquiring low-cost bandwidth and running data centers far away from expensive locales. Id.
generated content’s internal regulations. A website would be free to establish any restrictions on content that it chooses. Thus, hosts of user-generated content would be able to police their own websites to ensure that they were not in danger of collapsing. They could monitor user uploads, such that if the host believed that someone was abusing the system, the company could reject the uploaded video and potentially ban the user. Alternatively, a host of user-generated content could establish terms and conditions of use that limited the amount of infringing material that could be uploaded by an individual user, or it could establish a limit on the overall amount of content it would host that matches content in the copyrighted database. Such terms would allow a host of user-generated content to place an internal cap on the costs that it was willing to incur as part of the regime. Furthermore, if a host of user-generated content were to pass the costs down to the user, the user would be the one who pays for uploading infringing content, not the host. Any of these methods could eliminate the threat of economic warfare from competitors.

The five disadvantages just discussed have likely played a significant role in Congress’s failure to adopt this type of safe-harbor provision. Although both hosts of user-generated content and content creators stand to benefit from such a regime, they must both be willing to compromise for it to be adopted. Hosts of user-generated content would be required to pay money upfront while still undertaking the technological steps necessary to detect copyright infringing materials. Content creators would lose some control over their copyrighted materials and might not receive as much money in compensation as they could otherwise obtain through private contracts or lawsuits. In addition, Congress must be willing to enact a safe-harbor provision that directly affects large and powerful industries. When the DMCA was passed in 1998, content creators and internet companies may have been willing to wait until it was clear that a compromise was necessary to benefit all those involved before adopting such a safe-harbor provision. But now, fourteen years later, both sides may feel that the time for compromise has come.

**CONCLUSION**

This Note proposes a new legal regime to govern copyright infringement by hosts of user-generated content on the internet. This regime would make hosts of user-generated content immune from liability for infringement, both directly and indirectly, by using principles of ex ante and self-regulation, rather than the

current ex post enforcement regime. By giving websites the choice to opt into this regime, rather than replacing the current safe-harbor provisions, hosts of user-generated content would be able to choose the regulatory method best suited for their services.

The new economic safe-harbor regime would provide numerous benefits for both copyright holders and websites. First, the system would clarify the legal requirements that must be satisfied to receive protection from infringement liability. Second, it would limit the liability costs attached to copyright infringement. In light of the Second Circuit’s recent ruling in Viacom v. YouTube, these two benefits might be enough to convince websites to adopt the proposed economic safe-harbor regime. Third, the regime would improve the sharing of information between copyright holders and hosts of user-generated content. Fourth, it would increase incentive to innovate, both in developing filtering technology and new ideas for internet usage. Finally, the system would monetize infringement, providing copyright holders with payments for user-generated content that includes their copyrighted works. The proposed regime would provide an alternative solution to a widespread problem that has been growing for nearly twenty years and seems poised for continued growth with the passage of time.

180. 676 F.3d 19 (2d Cir. 2012).